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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 471

TEXAS EMPLOYERS' INSURANCE ASSOCIATION, ET AL.,
Petitioners,

v.

HUGH A. VORIS, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
IONS BELOW	1
SDICTION	2
TIONS PRESENTED	2
UTES INVOLVED	3
EMENT	4
IFICATION OF ERRORS TO BE URGED	7
ONS FOR GRANTING THE WRIT	8
LUSION	21

CITATIONS

CASES:

eechio v. Bowers, 296 U.S. 280	9
Sponatski, 220 Mass. 256	12
v. Traders & General Ins. Co., 140 Tex. 599, 169 S.W. 689	16
non v. Missouri Public Service Corp., 359 Mo. 257, 221 W. 2d 165	11
B v. Pittsburg S. S. Co., 340 U.S. 498	17, 18
ry v. Brown-Pacific-Maxon, Inc., 340 U.S. 504	16, 19
netti's Case, 299 Mass. 426, 13 N.E. 2d 34	15
ersal Camera Corp. v. NLRB, 340 U.S. 474	6, 17, 19, 20

STATUTES:

28, United States Code (C. 646—Public Law 773—Approved June 25, 1948), Sections 1254(1) and 2101(c) (Jurisdiction)	2
shoremen and Harbor Workers' Compensation Act (March 4, 1927), 44 Stat. 1424, as amended, 33 U.S.C. 901, t seq.,	
Section 903(b) (33 U.S.C. 903(b))	2, 3
Section 920(d) (33 U.S.C. 920(d))	9
Section 921(b) (33 U.S.C. 921(b))	17
inistrative Procedure Act., 60 Stat. 237, 5 U.S.C. 1001, t seq.,	
Section 1001(e) (5 U.S.C. 1001(e))	3, 6

TEXTS

rpus Juris, Section 392, p. 638	12
arvard Law Review, pp. 1233-1261,	
. 1249	18
. 1257	19

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our petitioners, Texas Employers' Insurance Association Burton Construction and Shipbuilding Company, pray a writ of certiorari issue to review the judgment of United States Court of Appeals for the Fifth Circuit, red in the above entitled case on July 11, 1951, and as nds therefor, respectfully show:

Opinions Below

he opinion of the District Court in this case is in the n of a letter addressed to the interested attorneys, which

appears in the record at Pages 357 to 359. It is not otherwise reported.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 190 FEDERAL REPORTER, 2d Series, page 929 et seq., and appears in the Record at pages 369 to 378.

Jurisdiction

The judgment of the Court of Appeals was entered on July 11, 1951 (R. 379). A timely petition for rehearing was filed by Petitioners, who were appellees in that court (R. 380), and said petition for rehearing was denied on August 10, 1951 (R. 392). By order of this Court dated October 31, 1951, the time for filing petition for writ of certiorari herein was extended to and including December 10, 1951 (R. 393). The jurisdiction of this Court is invoked under 28 UNITED STATES CODE, Sections 1254 (1) and 2101 (c).

Questions Presented

1. Whether, under Section 3 (b) of the Longshoremen's and Harbor Workers' Compensation Act [44 STAT. 1424, 33 U.S.C. 903 (b)], which provides that: "No compensation shall be payable if the injury was occasioned * * * by the willful intention of the employee to injure or kill himself * * * " death benefits may be recovered, in a case where the deceased employee shot himself with the intention of killing himself, even though he was suffering from a mental depression at such time.

2. Whether the death of an employee by his own hand, the suicidal act resulting from a mental illness caused by an accidental injury, but done with conscious volition, with full knowledge of the consequences and effects, and with

the express intention of killing himself, is, as a matter of law, willful within the meaning of Section 3 (b) of said Act.

3. Whether under the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C. 1001 et seq., the District Court's judgment as the primary reviewing court, based upon the exercise of discretion conferred upon him, should be independently reviewed by the Court of Appeals and its judgment substituted therefor, when there is reasonable ground for difference of opinion as to the substantiality of the evidence before the Deputy Commissioner.

4. Whether in this case there was substantial evidence on the whole record to justify the Court of Appeals in reversing the District Court's judgment which held that the findings of the Deputy Commissioner were not supported by substantial evidence.

Statutes Involved

The Statutes involved are the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424, 33 U.S.C. 901 et seq., and particularly Section 3 (b) thereof (33 U.S.C. 903 (b)) which provides:

> "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

Also involved is the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C. 1001 et seq., and especially that part of the Act, which provides that the reviewing court shall set aside agency action " * * * unsupported by substantial

evidence" * * * and that "in making the foregoing determination the court shall review the whole record or such portion thereof as may be cited by any party. * * * " 60 STAT. 243-244, 5 U.S.C. 1009 (e).

Statement

This case arises under the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424, as amended, 33 U.S.C. 901 et seq.

The deceased employee, Arthur Heinrich, sustained accidental injuries in an explosion aboard the M/V LENORA, in navigable waters of the United States, occurring October 8, 1948. During the period of his disability he was paid compensation under said Act by these Petitioners, the employer and insurance carrier, although he also returned to work and worked for said employer for several weeks thereafter.

On May 21, 1949, some seven months after such explosion, said employee was found in his own home, the victim of a gunshot wound in his head. On June 10, 1949, he died from the effects of such gunshot wound. No one was present at the time of such shooting, but the Deputy Commissioner found that it was self-inflicted with the intention of killing himself (R. 332).

The widow and children of the deceased filed claim for death benefits under the Act (R. 323-4), which claim was contested by Petitioners, the employer and insurance carrier (R. 326-328). Extended hearings at various places were had before the Respondent, Deputy Commissioner, and on November 16, 1949, the Deputy Commissioner made his compensation order in which he awarded death benefits to the widow and minor children of the deceased (R. 330-334).

The employer and the insurance carrier, Petitioners herein, duly filed a proceeding in the United States District Court for the Eastern District of Texas, Beaumont Division, as authorized by Section 21 (b) of the Act, seeking to have said award of death benefits vacated and set aside (R. 6-20).

After consideration of the record before the Deputy Commissioner, the District Court set aside the compensation order as not in accordance with law and wholly unsupported by evidence, and enjoined its enforcement (R. 341-343). A brief opinion by the District Judge, in the form of a letter to the interested attorneys, explained his reasons for setting aside the compensation order of the Deputy Commissioner (R. 357-359).

The Deputy Commissioner had made a formal finding that * * * "said gunshot wound was inflicted by employee, Arthur Heinrich, with the intention of killing himself; * * * that said act was the result of an irrational state of mind and uncontrollable impulse, and *that it was not an act* occasioned by the willful intention of the employee to injure or kill himself as contemplated by Section 3(b) of the * * * Act." (R. 332.) He also made informal findings that the deceased "quite clearly shot himself with the intention of killing himself." [1] Again he stated in writing that "it was undoubtedly intentionally done.[2] (R. 355-356)".

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[1] In a letter from the Deputy Commissioner to the United States Attorney transmitting the papers for trial in the District Court, he said in part: "Being acquainted with the case, however, I might point out briefly that the only apparent question of law on which appeal could be taken is the application of Section 3(b) of the Longshoremen's and Harbor Workers' Compensation Act in a case in which the injured employee quite clearly shot himself with the intention to kill himself." (R. 350, 352.)

[2] In a later letter to one of counsel for claimants, the Deputy Commissioner said:

The Deputy Commissioner and the claimants appealed from such judgment to the Court of Appeals for the Fifth Circuit, and on July 11, 1951, the Court of Appeals rendered its judgment reversing the judgment of the District Court (R. 379). The opinion, written by CIRCUIT JUDGE BORAH (R. 369-378), holds that the Deputy Commissioner could reasonably find that the accident and injury caused the deceased to develop maniac-depressive insanity and that this abnormal mental condition caused him to take his own life; that his reasoning faculties were so far impaired that his act of self-destruction was not voluntary and willful within the meaning of Section 3(b) of the Act (R. 378).

After pointing out that the scope of judicial review of the Deputy Commissioner's findings is governed by the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C. 1001 et seq., and that the standard is that discussed in UNIVERSAL CAMERA CORPORATION v. N. L. R. B., 340 U.S. 474, the Court of Appeals then independently reviewed the District Court's review, saying, "We are satisfied that the record supports the Deputy Commissioner's findings." (R. 377.) Despite an admitted conflict in the State Court decisions as to whether intentional suicide is compensable, the Court of Appeals said that under the findings of the Deputy Commissioner, " * * * we find it unnecessary at this time to de-

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"As there was no one present when Mr. Heinrich was shot, I naturally had to make an inference as to whether it was accidental or intentional. It was undoubtedly intentionally done and the act itself seems sufficient to me, in the light of all the evidence of his mental disturbance from time to time, to be sufficient to justify a reasonable inference that he went into one of his major mental upsets and that his intention to kill himself was not a decision of a rational mind and therefore was not such intention as is contemplated in Section 3(b) of the Longshoremen's and Harbor Workers' Act." (R. 355-356.)

termine the extent of the conflict claimed to exist in the decisions and to undertake to lay down a general rule of construction which will fit all cases." (R. 376.)

Petitioners timely filed petition for rehearing in the Court of Appeals (R. 380), asserting among other grounds, that since the District Court, having the primary duty of reviewing the Deputy Commissioner's findings, had reached a reasonable judgment in view of the record, his judgment ought not to be policed and independently reviewed by the Court of Appeals, merely because that Court differed with the views of the District Court (R. 381). This petition for rehearing was denied on August 10, 1951, without further written opinion (R. 392).

On October 31, 1951, this Court extended the time for filing petition for writ of certiorari in this case to and including December 10, 1951 (R. 393), and this petition is filed within such time.

Specification Of Errors To Be Urged

The Court of Appeals erred:

1. In failing to hold that, as a matter of law, the act of self-destruction was willful within the meaning of Section 3(b) of the Act so as to preclude recovery of death benefits.

2. In failing to hold that under this record the death of Arthur Heinrich resulted from his willful intention to kill himself, as contemplated by said Section 3(b).

3. In failing to hold that the findings and award of the Deputy Commissioner were unsupported by substantial evidence on the whole record.

4. In substituting its judgment for that of the District Court on the issue of substantiality, where reasonable minds could differ on such issue.

5. In independently reviewing the District Court's review and reversing his judgment, where it could not be said that the District Court did not reach a reasonable and conscientious judgment based upon a fair assessment of the entire record.

6. In failing to give finality to the judgment of the District Court.

7. In reversing the judgment of the District Court.

Reasons For Granting The Writ

1. This case involves an important question of Federal law, which has not yet been decided, in that the application of Section 3 (b) of the Longshoremen's and Harbor Workers' Compensation Act to a case of intentional suicide or intentional injury has never been determined by this Court. Clearly, the question presented is of importance in the administration of the Longshoremen's Act, in that the Act not only applies to those within the scope of the law as originally enacted, but it has been extended world wide to various other employments. It is the basic Workmen's Compensation Law for the District of Columbia, 45 STAT. 600. Under the Defense Base Act (Act of August 16, 1941, 55 STAT. 622, 56 STAT. 1035, 42 U.S.C. 1651), it covers employees of contractors with the United States and others in employments outside the United States. A vast number

of employees are necessarily within its coverage and many claims will necessarily result.[3]

That a construction of the Act constitutes a precedent of general application was recognized by this Court in DEL VECCHIO v. BOWERS, 296 U.S. 280, 285 (1935), where it was said, as the basis for granting certiorari over opposition:

> "The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of Section 20(d)."

Counsel for the Deputy Commissioner recognized that the case was one of first impression.[4]

DEL VECCHIO v. BOWERS, 296 U. S. 280, does not settle the question here involved, in that, although that case involved the question of suicide, the decision turned on the interpretation of Section 20 (d) of the Act, which creates a presumption that an injury is not willfully inflicted.[5]

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[3] During Fiscal 1950, 101,162 injuries and 259 deaths were reported; and $9,124,843.00 was actually paid. 38th Annual Report of Secretary of Labor (1950), pp. 103-112, p. 112(c)). Inevitably this volume produced proportionate judicial activity: From July 1, 1927, effective date of Act through Fiscal year 1949, a total of 1216 cases seeking judicial review were filed under the three coverages in the lower Federal Courts. (Annual Report, Bureau of Employees Compensation, Federal Security Agency, 1949, pp. 11-12).

[4] In his brief in the Court of Appeals, p. 32, he stated that: "This case presents a question of first impression under the Longshoremen's Act."

[5] Section 20 (d), U.S.C., Title 33, Section 920 (d): "In any proceeding for the enforcement of a claim for compensation it will be presumed, in the absence of substantial evidence to the contrary . . (d) That the injury was not occasioned by the willful intention of the employee to injure or kill himself or another."

This Court held that where there is sufficient testimony to justify a finding of suicide, the presumption falls out of the case, as the presumption alone never has the attribute of evidence in the claimant's favor. There the sole question was whether an admittedly self-inflicted injury was accidental or intentional—if accidental, it was compensable, and if intentional, it was not.

Here, however, we have a case where the award is sought to be justified on the theory that the original injury caused the development of a mental depression which resulted in suicide over seven months later. As noted above, the Deputy Commissioner expressed the opinion that "it was undoubtedly intentionally done." In addition to a formal finding that the gunshot wound "was inflicted by employee, Arthur Heinrich, with the intention of killing himself" (R. 332), he made additional formal findings (1) that following the original injury Heinrich *was unable to perform his work for any considerable length* of time, although findings of several medical examiners showed no physical disability for such work; (2) that subsequent examinations showed he had developed a state of mental depression manifested by extreme emotional disturbances and lack of self-control, and, at times, by his statements of a desire or intent to end his troubles by suicide; (3) that this condition resulted from the effects of the explosion; (4) that the act of intentional shooting was the result of an irrational state of mind and uncontrollable impulse, and that it was not an act occasioned by the willful intention of the employee to injure or kill himself as contemplated by Section 3 (b) of the Longshoremen's and Harbor Workers' Compensation Act (R. 331-332).

The Deputy Commissioner, in his brief and argument before the Court of Appeals, after pointing out that the case was one of first impression under the Act, then urged

the Court to adopt the so-called liberal rule, sometimes referred to as the "English rule", as opposed to the "American rule" or the so-called "Massachusetts rule". The Court of Appeals said in part:

> "Appellant not disputing this statement of the general American rule, but denominating it the Massachusetts Rule, and insisting that it was over harsh in its origin and has been increasingly harshly applied, cites cases opposed to this rule from other states, including Whitehead v. Keen Roofing Co., 43 So. (2) 464, from Florida, and the Delinousha case, and invokes the decisions under the English Workmen's Compensation Act, and the amendment of the Mass. statute as supporting a more liberal rule", (R. 375)

but nevertheless declined to decide which rule should be followed, saying that

> "* * * we find it unnecessary at this time to undertake to lay down a general rule of construction which will fit all cases." (R. 376.)

In the absence of a decision construing the Longshoremen's Act, decisions construing similar provisions in State Workmen's Compensation Acts are resorted to as precedents. The American cases have, almost without exception, denied death benefits in cases of intentional suicide, on the basis, as stated by one Court:

> "Concede that self-destruction is never prompted by a normal mind, yet if done with sufficient mental power to know the purpose and effect of the act, even though dominated by a disordered mind, it is intentional suicide." [6]

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[6] **Mershon v. Missouri Public Service Corp.**, 359 Mo. 257, 221 S.W. 2d 165 (Mo. Sup. Ct. 1949).

The American rule is summarized in CORPUS JURIS, Vol. 71, Sec. 392, p. 638, as follows:

> "Provided the insanity results from a compensable accident and not from a brooding over the injury or other causes, the suicide of an employee while insane may entitle his dependents to compensation therefor; thus, where there follows as a direct result of the accident an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death, there is a direct and unbroken causal connection between the physical injury and the death; however, where the suicide is the result of voluntary and willful choice determined by a moderately intelligent mental power with knowledge of the purpose and effect of the act, even though dominated by a disordered mind, a new and independent agency breaks the chain of causation,"

and stated by the Court of Appeals to express the "generally accepted view of the law of the American cases" (R. 373), is based on the holding in a Massachusetts case [7] the earliest American case on the subject, and which has been followed in many jurisdictions.

In view of the fact that provisions of the Longshoremen's Act have been extended to various other employments, so that an increasing number of employees come within its provisions, settlement of the question is highly important.

2. The decision of the Court of Appeals is believed to be erroneous, on the ground that there is not substantial evidence on the whole record to support the Deputy Commissioner's findings, and because, under the record in this case,

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[7] In re Sponatski, 220 Mass. 258, 108 N.E. 466 (1915).

the intentional suicide of the deceased is willful, as a matter of law, within the meaning of Section 3(b) of the Longshoremen's Act.

No witness testified that the deceased acted under an "uncontrollable impulse", as found by the Deputy Commissioner, the nearest thing to such being an opinion that it was not "entirely voluntary".[8] Three doctors who had professionally attended the deceased during his lifetime testified. Two of these doctors were psychiatrists connected with the University of Texas Medical School, the other a general practitioner. One of them testified that several weeks prior to the fatal shooting, the deceased entertained "suicidal thoughts";[9] that the diagnosis of depression seemed to be one hundred percent (R. 211); that such persons commit suicide "with a purpose in mind" (R. 230); that outside of feeling blue and despondent, a person such as deceased is "perfectly intelligent" (R. 229). Both psychiatrists testified unequivocally that the act of the deceased in shooting himself was "voluntarily and willfully done with the idea of accomplishing the purpose in mind, and not in a delirious frenzy; [10] also that such persons "deliberately

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[8] Dr. Eisenstadt, called by claimants, testified: "I would not say it is entirely voluntary—he does not take everything into consideration. For instance, the soldier who takes a gun and shoots somebody else—he doesn't take into consideration his family or anything. I don't know that it amounts to anything in the case, but I think there is some lack of intelligence in the case." (R. 231.)

[9] Dr. Eisenstadt: "Q. He told you that he had entertained some suicidal thoughts? A. Yes, sir." (R. 237.)

[10] Dr. Harris: "Q. And when such a patient—depressed patient—such as Mr. Heinrich, attempts suicide, it is the result of a voluntary and willful choice on the part of that person—is that correct? A. Yes, sir. * * * Q. It is not a case of a person in a delirious frenzy or anything of that kind? A. Not in a case of depression." (R. 262, 263.)

plan suicide." [11]

According to the widow, while she was writing a letter to their son, the deceased walked to one of the back rooms in the house; she then heard a shot and upon going to the room, found deceased on the floor with a gunshot wound in his forehead (R. 69-70); that just prior to the shooting, he had asked her to send friendly greetings to their son and to ask him to come home for a visit (R. 68, 70). It is especially worthy of note that the widow made claim under a life insurance policy, claiming that the cause of death was accidental.[12]

The Deputy Commissioner in a letter to one of counsel, stated that as no one was present when Mr. Heinrich was shot, he naturally had to make an inference as to whether it was accidental or intentional. After stating that it was "undoubtedly intentionally done", he further explained his reasoning by saying that "the act itself seems sufficient to me * * * " (R. 355) to justify an "inference that he went into one of his major mental upsets and that his intention to kill himself was not a decision of a rational mind, and therefore was not such intention as is contemplated in Section 3(b) * * * " (R. 355-356.)

The Court of Appeals held that there was "substantial

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[11] Dr. Otto: "Q. And does that type of person suffering from that type of illness—do they have the mental power to know what they are doing? A. Yes, they deliberately plan it. Q. In other words, they deliberately plan suicide? A. Yes, sir." (R. 289-290.)

[12] Twelve days before she filed claim for compensation she signed a claim against California-Western States Life Ins. Co. in which she made the following statement: "(c) How did accident happen? Deceased was cleaning a rifle when it discharged and shot him through the top front part of his head. (d) What was deceased doing and where was he going at such time? This accident occurred in his home. (e) Did accident arise out of or in the course of deceased's employment? No." (Exhibit A-R. 243.)

medical evidence" showing certain effects of the depressive illness from which deceased was suffering, upon which the Deputy Commissioner could find that "his act of self-destruction was not voluntary and willful within the meaning of Section 3(b) of the Act." (R. 378.)

Yet in the entire record the "substantial" medical testimony referred to is found only in testimony from a medical witness that he "would not say it is entirely voluntary" and that he would not say that deceased "was completely in control of his mental faculties" at the time he saw him several weeks before the shooting; [13] together with an answer by another medical witness to a question of the Deputy Commissioner, where the doctor undertook to give a legal opinion rather than a medical opinion.[14]

RUSCHETTI's case, 296 Mass. 426, 431 (Mass. Sup. Ct., 1938) points out the line of demarcation between compensable and non-compensable suicide cases, as follows:

> "In substance, a distinction is drawn between the act of a man, insane as a result of an injury, who nevertheless consciously determines to take his own life and carries his design into execution, in which case the chain of causation between the injury and the death is broken through the voluntary though insane choice of the injured person to die; and on the other hand, the suicidal act of such a man while in a moment of delirium

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[13] Testimony of Dr. Eisenstadt. (R. 235.)

[14] Dr. Otto testified, in response to a question of the Deputy Commissioner as to the sanity of a depressed person: "Do you mean can he be committed. As I said, we are using different terms. You are speaking in legal terms and we are talking about a medical terminology. I think, as far as the Courts are concerned, he would be committable. . . . " (R. 290.) He also said: "As you perhaps know, sane and insane is a legal term and not a medical term. I would call that man as being depressed, which is the medical term." (R. 290.)

> or frenzy or while under an uncontrollable impulse, 'without conscious volition to produce death, having knowledge of the physical nature and consequences of the act' in which case the injury that produced his mental condition is also the cause of his death."

JONES v. TRADERS & GENERAL INSURANCE CO., 140 Texas 599, 169 S.W. 2d 160 (1943), likewise follows the American rule, and is very similar to this case on the facts. In that case the jury made fact findings to the same effect as those made here by the Deputy Commissioner, but the Court nevertheless denied recovery. (Commission of Appeals of Texas, opinion adopted by Supreme Court.)

While the American cases recognize an uncontrollable impulse or a delirium of frenzy will deprive a suicidal act of willful intention, the element of conscious design and volition to produce death is here shown beyond question, and the finding of uncontrollable impulse rests solely on speculation and conjecture. As stated by the District Judge in his opinion, the Deputy Commissioner "apparently based his findings and conclusion solely on the mere fact that Arthur Heinrich shot himself * * *" (R. 358.)

3. The case involves the question of judicial review of the Deputy Commissioner's award in the light of the Administrative Procedure Act. This was the basis on which certiorari was granted in O'LEARY v. BROWN-PACIFIC-MAXON, INC., 340 U.S. 504.

The District Court, on review of the record, held that the compensation order is "not in accordance with law and is wholly unsupported by evidence." (Decree of District Court, R. 342) and that there was "no substantial evidence" to support the findings and conclusion of the Deputy Commissioner that the act of suicide was not one of willful intention. (Opinion of District Court, R. 357.)

At the time the case was heard in the District Court, as well as at the time the briefs were filed in the Court of Appeals, the opinion of this court in UNIVERSAL CAMERA CORP. v. N. L. R. B., 340 U.S. 474, N. L. R. B. v. PITTSBURGH S. S. Co., 340 U.S. 498, and O'LEARY v. BROWN-PACIFIC-MAXON, INC., 340 U.S. 504, had not been handed down. The Deputy Commissioner contended in his brief before the Court of Appeals that he was required to show only that there was *some* testimony to support the findings —not that they were required to be supported by "substantial evidence on the whole record." [15]

Apparently the District Judge also considered that the scope of review was at least narrower than the standard discussed in the UNIVERSAL CAMERA case; so it could hardly be said that he failed to apply the proper standard.

In cases arising under the Longshoremen's Act, the District Court is the court primarily charged with the duty of judicial control. Section 21(b) of the Act. As such, the matter of determining whether there is substantial evidence on the whole record to support the Deputy Commissioner's findings is primarily and essentially entrusted to the District Court, with the right to exercise some degree of discretion. And where, as here, it cannot be said that the District Court did not apply a proper standard, or did not reach a reasonable and conscientious judgment based on a fair assessment of the record, that judgment should not be disturbed upon an independent review of the District Court's review, merely

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[15] On p. 11 of his brief: "The following is a reference to so much of the testimony before the deputy commissioner as is considered sufficient to show that the above finding of fact is supported by evidence. This reference is not intended to cover all the testimony as under the authorities it is necessary to only show that there is evidence to support the findings of fact of the deputy commissioner."

because the appellate court differed with his views on the question of substantiality. Of course, in cases where the District Court has obviously failed to apply the proper standard, or has ignored obviously substantial evidence, the inherent power of the appellate court to reverse may be properly exercised. Such is not the case here, and it is submitted that what was said by this Court in the PITTSBURGH STEAMSHIP case, 340 U.S. 498, 503, is quite applicable here:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it titlting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Court of Appeals depend on appreciation of circumstances which admit of different interpretations."

Professor Louis L. Jaffe, Byrne Professor of Administrative Law, Harvard Law School, in his article entitled Judicial Review: "Substantial Evidence on the Whole Record," 64 HARVARD LAW REVIEW, pp. 1233, et. seq. (June, 1951), says at p. 1249 in discussing that opinion:

> "Under the previous dispensation it was twice found necessary to take cases from the Court of Appeals for the Fifth Circuit, once in order to administer a rebuke to that court for its obvious failure or refusal to apply the substantial evidence rule as then understood by the

> Supreme Court. But it is significant that the second time, Mr. Justice Frankfurter dissented because in his view the Court was attempting to impose not only its standards but its particular judgment upon the court which he believe to be primarily charged with the duty of judicial control. His view in that respect appears now to have prevailed. Not only is the scope of review broadened beyond what it was before, at least in the Supreme Court, but some degree of discretion is now placed squarely in courts of appeals. Their conscientious judgment on a case in which judges might differ on the issue of substantiality will not be policed."

Further at page 1257 in discussing O'LEARY v. BROWN-PACIFIC-MAXON, INC., 340 U.S. 504, Professor Jaffe says:

> "The basis for reversal is not entirely clear. The case raises questions of great complexity which can be dealt with here only in a summary manner. The analysis of Mr. Justice Frankfurter appears to be as follows: Whether the death arose out of and in the course of employment is a question of fact. Judicial review is therefore governed by the standard laid down in the *Camera* case. The question for the reviewing court was whether there was substantial evidence on the whole record to support the finding. "The District Court recognized this standard," and it cannot be said that it improperly applied it. Thus, according to this rationalization, the district court under the Longshoremen's Act occupies the role of the court of appeals under the Taft-Hartley Act and must not be reversed where its judgment is reasonable."

In the UNIVERSAL CAMERA case, 340 U.S. 474, at 491, this Court said:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which

> Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

It is submitted that what was said by this Court in the UNIVERSAL CAMERA case shows that the District Court's judgment on a review of findings of a deputy commissioner under the Longshoremen's Act should not be reversed except in cases where the standard appears to have been misapprehended or grossly misapplied. Litigants have ample protection on fact and quasi-fact-law issues by decision of the Administrative Agency and a full review by the first court (District or Circuit, depending on the agency). The next higher court (Circuit or Supreme) has too many further responsibilities to permit a "second" review to test or reverse or modify orders of the first court.

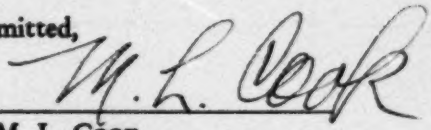
It might be appropriate to point out that the record in this case reflected a great deal of testimony other than medical testimony. There was testimony showing that three of deceased's sons had been adjudged delinquent and one of them sentenced to the reform school only two days before the fatal shooting (Testimony of Probation Officer, R. 91-117); testimony from the deceased's minister with reference to conversations with deceased on the day of the fatal shooting (R. 117-131); also from the Principal of the school attended by his children as to conversations had on the same day (R. 170-184). The entire record of testimony taken comprises some 250 pages which the District Judge stated was given "full consideration". (R. 357.)

It is submitted that this Court should grant certiorari to settle the question of the extent to which the Court of Appeals should review the District Court's review of awards of deputy commissioners.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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